

In

The Supreme Court

of the United States

OCTOBER TERM, 1942

No. 597

ADA McSPARRAN,
Petitioner,

vs.

CITY OF PORTLAND,
Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

On September 13, 1941, the petitioner, Ada McSparran, was charged in the Municipal Court of the City of Portland, Oregon, with violating Ordinance No. 32927 by allowing her two daughters, Jacqueline, age 12 years, and Rhea, age 9 years, to sell or expose for sale, magazines on the street

(Tr. of record p. 1). She interposed a motion to dismiss the case on the ground that the ordinance was in conflict with the Federal Constitution in that it restricts freedom of speech, freedom of the press, and freedom of worship of Almighty God, and in violation of the 14th Amendment of the Federal Constitution (Tr. p. 2). On September 20, 1941, she was found guilty and fined $21. She appealed to the Circuit Court of the state of Oregon for the county of Multnomah where the case came on for trial de novo on April 16, 1942. There was no motion here to dismiss the case as in the lower court. The evidence was taken as shown by the Tr. pp. 3-56.

On June 8, 1942, a judgment was entered in the Circuit Court wherein she was found guilty and fined $21, and it was further ordered that the fine be suspended. An attempt was then made to appeal to the Supreme Court of the state of Oregon. A notice of appeal, undertaking and transcript were served and filed. The transcript there filed was apparently the same as the transcript now presented to this Court. On August 22, 1942, the City of Portland moved to dismiss the appeal, and on September 22, 1942, the Supreme Court held that it had no jurisdiction and ordered the appeal dismissed (see Tr. pp. 94-96). Application to this Court for a writ of certiorari was made on or about December 21, 1942, more than six months after the judgment of the Circuit Court.

POINTS, AUTHORITIES AND ARGUMENT

The respondent objects to the issuance of a writ of certiorari on the grounds (1) that the Supreme Court of Oregon had no jurisdiction of the appeal, passed upon no federal question, and therefore a writ of certoriari to that Court would be improper and not present a federal question to this Court; (2) that if the petition here be construed as applying for a writ to the Circuit Court, the application comes too late, for it is more than three months after the entry of judgment in the Circuit Court, and there was no extension of time applied for or obtained; (3) that the record upon which the petition for a writ of certoriari is based fails to show that a federal question was properly presented to the Circuit Court, and therefore fails to show that this Court has jurisdiction to issue the writ; and (4) that if the petition be considered on its merits it fails to disclose any merit or any federal question of importance or of unusual character, such as to move this Court to review the action of the Circuit Court for Multnomah county, Oregon.

FIRST AND SECOND POINTS

These points may be considered together because the cases usually apply to both. We think, however, that no discussion is called for because this Court has so recently reviewed the questions and reaffirmed many previous holdings to the effect that an attempted appeal to the Supreme

Court of a state from a decision of a lower court which in fact was the court of last resort in the state insofar as that particular case is concerned, is of no avail in the matter of tolling the statutory provision which limits the time for applying to this Court for a writ of certiorari, and that the petitioner is too late if three months have elapsed after the determination of the state court of last resort. We refer to *Department of Banking v. Fink,* ——U.S.—— 87 L. Ed. "Advance Opinions", pp. 218, 220, and cases there cited.

Counsel for petitioner at page 3 of the petition cites several cases to the effect that the judgment of the Circuit Court did not become final under the appellate procedure of Oregon until September 22, 1942, when the Supreme Court of Oregon dismissed the appeal. The cases referred to, however, apply only in cases where the highest court of the state had a discretionary power to entertain the appeal or not to entertain the appeal. But such is not the case in the matter here before the Court because the Supreme Court of Oregon had no power whatever to entertain the appeal of Mrs. McSparran from the Circuit Court for Multnomah county. The Supreme Court of Oregon could do nothing but dismiss the appeal, and this it did.

The case of *Western Union Tel. Co. v. Hughes,* 203 U.S. 505, 51 L. Ed. 294, which is relied upon by the petitioner is squarely in point in favor of the respondent in this matter. Many later cases to the same effect might be cited, but it

seems sufficient to refer to the following: *Western Union Tel. Co. v Priester,* 276 U.S. 252, 48 S. Ct. 234, 72 L. Ed. 555; *Chicago Etc. Co. v. Industrial Com.,* 284 U.S. 296, 52 S. Ct. 151, 76 L. Ed. 304; *McMaster v. Gould,* 276 U.S. 284, 48 S. Ct. 299, 72 L. Ed. 574.

The petitioner might have protected herself by obtaining an extension of time as provided by Sec. 315 of 28 U. S. C. A., for she had ample warning of danger by the motion to dismiss. This was in ample time for the petitioner to have obtained an extension of time, and then filed the petition for writ of certiorari in this Court within the extended time when it became apparent that the Supreme Court of Oregon would not pass upon its jurisdiction before an expiration of the time. As matters now stand we respectfully submit that this Court is without jurisdiction to entertain the petition.

THIRD POINT

THE RECORD IN THE CIRCUIT COURT FAILS TO SHOW THAT A FEDERAL QUESTION WAS SUBMITTED. THUS, THE PETITION FOR A WRIT OF CERTIORARI FAILS TO SHOW JURISDICTION IN THIS COURT.

If the petitioner intended to raise a federal question in the Circuit Court she should have moved for a dismissal of

the case, as she moved in the Municipal Court, and she should have specified definitely in what particular her constitutional rights under the 14th Amendment were impaired, or she should have objected to any evidence against her, particularly specifying the provisions of the Federal Constitution under which she claimed protection and the particulars in which her constitutional rights were impaired. She did neither.

However, the bill of exceptions (Tr. pp. 59 and 60) shows that the trial was had in the Circuit Court de novo, that a jury was waived, and that the petitioner "challenged the constitutionality of the ordinance involved upon the grounds that the enforcement of the same infringed the defendant's constitutional right to freedom of the press, freedom of speech, and freedom of religion, in support of her motion for a directed verdict and her case and cause."

Manifestly, inasmuch as a jury was waived there could be no motion for a directed verdict. But let us suppose that she intended to move for a dismissal of the case (and a recital appears in the Judgment Order that she "urged a substantial federal question as to the constitutionality of the ordinance in question, both on its face and as construed and applied as a denial of freedom of the press, freedom of speech and freedom of worship").

The motion (whether one or the other be taken) is insufficient because it failed to point out in what particular

her right to freedom of the press, freedom of speech and freedom of religion was involved.

In *Honeyman v. Hanan,* 300 U.S. 14, 81 L. Ed. 476, this Court passed upon two points both of which apply in this case and show that the record is insufficient to confer jurisdiction. There as here the record failed to show that a question under the Federal Constitution was directly raised and passed upon by the State Court and that a certificate or statement by the State Court that a federal question had been presented to and necessarily passed upon by it, is not sufficient where the record of proceedings at the trial fails to disclose that a federal question was presented and passed upon by the Court. This Court, speaking by the then Mr. Chief Justice Hughes, said: (p. 18 of 300 U.S.) "Before we may undertake to review a decision of the court of a state, it must appear affirmatively from the record, not only that the federal question was presented for decision to the highest court of the state having jurisdiction, but that its decision of the federal question was necessary to the determination of the cause. * * * As this Court must decide whether it has jurisdiction in a particular case, this Court must determine whether the federal question was necessarily passed upon by the State Court. *That determination must rest upon an examination of the record. A certificate or statement by the State Court that a federal question has been presented to it and necesesarily passed upon, is not controlling."*

Referring now to the recital above quoted from the bill of exceptions and the recital in the Judgment Order, it will be seen that neither is supported by anything in the transcript of proceedings at the trial.

Similar rulings were made in *Lynch v. People of the State of N. Y.,* 293 U.S. 52, 79 L. Ed. 191, in *State of Minn. v. National Tea Co.,* 300 U.S. 551, 84 L. Ed. 920, in *City of New York vs. Central Savings Bank,* 306 U.S. 661, 83 L. Ed. 1058, and in *Hughes v. Wendel* 87 L. Ed. "Advance Opinions" 130, and cases there mentioned. See also the annotations following the Minn. case as reported in L. Ed. beginning at p. 925, and notes in 63 L. R. A. 33, 329 and 471, and notes following Sec. 347 in 28 U. S. C. A.

The ordinance provided, "It shall be unlawful for any parent, guardian, custodian or person having charge or control of any boy under the age of ten years or of any girl under the age of eighteen years, to permit any such boy or girl to sell, expose, or offer for sale on any street any newspaper, magazine or periodical * * * ". (Tr. p. 77, Defendant's Ex. 6).

Now, if we assume that a motion was made in the Circuit Court similar to that made in the Municipal Court, we find that freedom of speech, freedom of the press and freedom of worship are mentioned, but there is no mention made of the manner in which it is claimed that this ordinance violates any of these freedoms, and there is nothing in the transcript

of record to indicate that Mrs. McSparran's freedom of the press, her freedom of speech or her freedom of worship, is in any way violated by the ordinance. The record fails to show that she made any claim that any of *her* freedoms were violated by the ordinance. She did not claim that the freedom of the presses of the Watch Tower Bible and Tract Society, Inc., were impaired by the ordinance, or that the freedom of speech of herself and children was impaired by it, or that the religious freedom of herself was impaired. She has no standing in court to claim that the ordinance is unconstitutional because the rights of the Watch Tower Bible and Tract Society, Inc., or the rights of her children are impaired.

"One of the elementary doctrines of constitutional law, firmly established by the authorities, is that the constitutionality of a legislative act is open to attack only by a person whose rights are affected thereby." (11 Am. Jur. 748, "Constitutional Law", Sec. 111.)

The petition for a writ of certiorari complains that the judgment of the Circuit Court is erroneous (1) because it "abridges and denies petitioner's rights to bring up her children in the nurture and admonition of the Lord and direct the spiritual welfare of said children * * * " and (2) because it "abridges and denies petitioner's and her children's rights of freedom of speech, press, and worship * * * ".

The record shows that the first ground of error was not raised in or presented to the Circuit Court. It is therefore not available to the petitioner at this time. Yet it is the only basis of the argument submitted in support of the petition. The second ground of error is the only ground of complaint that is claimed to have been presented to the Circuit Court, and it is not available in support of the petition because it does not appear to have been made so as to be properly included in the transcript of record for this Court,— and, if it were properly in the record, it would be of no avail because the record fails to show that either of the three freedoms mentioned is impaired by the ordinance *in so far as Mrs. McSparran is concerned. Her* rights to sell or distribute the magazines, to worship, to speak and to print are not affected. The fact is, as shown by the argument accompanying the petition, that her "right" to have the children sell or distribute the magazines is the only right (if it be a right) that has been impaired. Yet, strangely enough, she made no mention of this alleged impairment at the trial in the Circuit Court. On the contrary she testified that she never instructs her daughters to display and distribute the Watch Tower on the streets, and that, "They go gladly and willingly, and *I have taught my children* in the culture and admonition of the Lord and they understand that it is their duty toward their Creator." (Tr., pp 24 and 25,—italics supplied).

The children corroberated Mrs. McSparran's testimony. (Tr. pp. 44 and 48).

In view of the above we respectfully maintain that the record fails to present a federal question in support of the petition.

FOURTH POINT

THE ORDINANCE IS AN EXERCISE OF POLICE POWER AND NOT INVALID UNDER THE 14TH AMENDMENT OF THE FEDERAL CONSTITUTION.

The record brought to this court fairly shows, as we think, that the ordinance is a reasonable exercise of the police power. Its object is to enable children to engage in recreation and play with other children of their age, thus affording them better health, co-operation in acting with others, quicker mental and physical reaction and generally a more favorable outlook upon life than results when a child is deprived of these opportunities, and required, as in the case of Mrs. McSparran's children, to stand on the streets for long periods of time holding in their hands for sale or distribution magazines and carrying bags containing magazines on which is written "Watch Tower and Consolation, 5 cents each" (Tr. p. 21).

Moreover, a child who stands on a crowded street is

subject to possible, indeed probable, injury, especially at times when people are intent upon reaching their homes, reaching their offices or other places. A child (especially a girl) does not have sufficient stature and strength to fend against men and women who are in a hurry.

It is insufficient to say that Mrs. McSparran accompanied her girls, on the occasion of her arrest, and that she would have protected them against injury. The ordinance is necessarily drawn without reference to the protection of mothers, and it is not certain that the mothers would be with the children at all times and be able to protect them.

Yet again,a child, especially a girl of tender years, who is on the street without a parent or guardian is subjected to temptation and danger of being lured to a place where she will meet with foul treatment.

There is also in this ordinance the thought of keeping children at or about their homes or schools and to keep them from being exploited by careless parents who seek to obtain the money that the children may earn.

The council of the City of Portland was and is clothed by the legislative assembly of the state of Oregon with authority to exercise the police power of the state of Oregon within the boundaries of the city to the full extent that the legislative assembly itself might exercise such power [see Sp. Or. Laws 1903, page 26, sec. 72, subdiv.. (1)].

We quote:

"The council has power and authority subject to the provisions, limitations and restrictions in this chapter contained:

(1) To exercise within the limits of the City of Portland all powers commonly known as the police power to the same extent as the state of Oregon has or could exercise said power within said limits."

This charter provision is in sec. 34 of the 1913 compilation, at page 25 of the 1926 compilation, and in sec. 2-105 of the 1942 compilation. See also *Slovanian, Etc. Ass'n v. City of Portland,* 111 Or. 335, 357, 225 Pac. 1098; *Baggage, Etc. Co. v. City of Portland,* 84 Or. 343, 352, 164 Pac. 570, LRA. 1917F 1080.

The petitioner in this case has introduced a group of ordinances including the one here challenged, all of which appear very clearly to have been passed under the police power and for the protection of children. We refer to the ordinances (Ex. 6, p. 75 of Tr.) making it unlawful to give, furnish, loan or sell to any minor under 18 a pistol, firearm or instrument capable of receiving or discharging any cartridge, etc., or to give, furnish, loan or sell to any such minor ammunition, etc., and (p. 76) unlawful to give, furnish, lend or sell to any minor under 18 any dart having a sharp metal tip or point designed or adapted to be thrown, etc., and unlawful for any parent or guardian of any minor under 16, or for any manager of any public entertainment where

an admission fee is charged, to permit such minor to participate in such public entertainment, and unlawful for minors to be on the streets after certain hours unless accompanied by parent, guardian or other proper companion specially chosen by the parent or guardian to escort the child (p. 81).

And in the same ordinance which contains the provisions that are challenged in this case, it is made unlawful for any minor to sell, expose or offer for sale any newspaper, magazine or periodical in any bawdy house, or on any car (p. 78), and by another ordinance, it is made unlawful to sell, barter, trade or give, or in any manner furnish, to any minor under 21 any tobacco, cigar or cigarette, etc., or to rent, hire out or allow the use of any canoe to any person under 18 years of age for use upon the Willamette river (pp. 78 & 79).

The ordinance here challenged is manifestly for the public welfare, to the end that children may become good citizens who are alert, co-operative, strong, healthy and capable. A child who engages in sports with other children becomes reasonably tolerant of others, alert, cooperative, resourceful, strong, healthy and thus likely to become a good citizen, while a child who is overworked is likely to become stolid, stunted, unhealthful, incapable, lacking in cooperation, resourcefulness, and unreasonably intolerant toward others, and especially if such child be taught from infancy that he or she must be a preacher of the Gospel, stand on the streets and hold up magazines for sale, and

become a messenger of THEOCRASY and thus assist in teaching that all religions are the works of Satan; that all governments are wicked and instrumentalities of Satan, that all Christians (other than Jehovah's witnesses) are servants of Satan and condemned to utter destruction. Later in this brief we will show some of the baneful effects which have resulted from a training of children to work in this service of "preaching the Gospel of God's Kingdom" as expressed by Jacqueline McSparran (Tr. p. 44).

We hardly need cite authorities to show that the 14th Amendment is not designed to, nor is it so construed or applied, as to prevent the enactment of such legislation under the police power. For a compilation of cases in this court on the subject we refer to U.S. Sup. Ct. Rep. Dig. vol. 4, pp. 2150 and following, and Pocket Supp. pp. 125, and following, also Or. Sup. Ct. cases in the annotations following the 14th Amendment to the Federal Constitution as given in Oregon Compiled Laws Annotated, vol 9, pp. 34 and following.

Children are wards of the State and especially subject to an exercise of police power notwithstanding the wishes of parents to the contrary.

In *State v. Shorey,* 48 Or. 396, 86 Pac. 881, it appears that the defendant was charged with violating a statute which restricted the employment of children to certain hours. The Supreme Court of Oregon, referring to the 14th Amend-

ment of the Federal Constitution and to section 1 Article I of the state Constitution, where it is declared that "all men when they form a social compact are equal in rights," said:

> (Page 398 of 48 Or.) *"These constitutional provisions do not limit the power of the state to interfere with the parental control of minors,* or regulate the right of a minor to contract, or of others to contract with him: 2 Tiedeman State & Fed. Con. sec. 195. It is competent for the state to forbid the employment of children in certain callings merely because it believes such prohibition to be for their best interest, although the prohibited employment does not involve a direct danger to morals, decency, or life or limb. *Such legislation is not an unlawful interference with the parents' control* over the child or right to its labor, nor with the liberty of the child: *People v. Ewer,* 141 N.Y. 129 (36 N.E. 4, 25 L.R.A. 794, 38 Am. St. Rep. 788).
>
> *They (children) are wards of the state and subject to it's control. As to them, the state stands in the position of parens patriae, and may exercise unlimited supervision and control over their contracts, occupation and conduct, and the liberty and right of those who assume to deal with them. This is a power which inheres in the government for its own preservation and for the protection of the life, person, health and morals of its future citizens. 'It has been well remarked,' says Mr. Justice Gray in People v. Ewer, 141 N.Y. 129 * * *,' that the better organized and trained the race, the better it is prepared to hold its own. Hence it is that laws are enacted looking to the compulsory education by parents of their children, and to their punishment for cruel treatment, and which limit and regulate the employment of children in the factory and work shop to prevent injury from excessive*

labor. It is not and cannot be disputed that the interest which the state has in the physical, moral and intellectual well-being of its members warrants the application and the exercise of every just power, which will result in preparing the child, in future life, to support itself, to serve the state and in all the relations and duties of adult life to perform well and capably its part.'

"The supervision and control of minors is a subject which has always been regarded as within the province of legislative authority. How far it shall be exercised is a question of expediency and propriety which it is the sole province of the legislature to determine. The judiciary has no authority to interfere with the legislature's judgment on that subject, unless perhaps, its enactments are so manifestly unreasonable and arbitrary as to be invalid on that account."

See also *State v. Muller,* 48 Or. 252 254, et seq. (Same case in this Court, 208 U.S. 412, 52 L. Ed. 551.)

The fact that each state in the United States is the *parens patriae* of the children in the state is further shown by the opinion of Mr. Justice McLean (1854) in *Fountain v. Ravenel,* 17 How. 369, 15 L. ed. 80, where at page 86 it is said:

"In *Wheeler v. Smith* (9 How. 55) this Court said: 'When this country achieved its independence the prerogative of the crown devolved upon the peoples of the states, and this power still remains with them except so far as they have delegated a portion of it to the federal government. The sovereign will is made known to us by legislative enactment. *The state as a sovereign, is the parens patriae.'* "

Mr. Chief Justice Taney in a concurring opinion said (page 90 of 15 L. ed.):

> "The second section of the article of the Constitution declares that the judicial power of the United States shall extend to all cases in law and equity specified in the section. These words obviously confer judicial power and nothing more; and cannot, upon any fair construction, be held to embrace the prerogative power, which the king as *parens patriae,* in England exercised through the courts. And the chancery jurisdiction of the courts of the United States, as guaranteed by the Constitution, extends only to cases over which the courts of chancery had jurisdiction in its judicial character as a court of equity. The wide discretionary power which the chancellor of England exercises over infants or idiots or charities has not been conferred. *These prerogative powers which belong to the sovereign as parens patriae, remains with the states."*

Parenthetically, it may be noted that in 1924 an attempt was initiated to obtain a constitutional amendment known as the Child Labor amendment (43 Stat. L. 670) authorizing Congress to limit, regulate and prohibit the labor of persons under 18 years of age, and suspending state laws to the extent necessary to give effect to legislation enacted by Congress. See in this connection *Coleman v. Miller,* 307 U.S. 433, 83 L. ed. 1385, 59 S. Ct. 972, 122 A.L.R. 695 and 697).

Child labor laws have been universally upheld as may be seen from the annotations in 12 A. L. R. 1216, 72 A. L. E. 137, 142, 90 A. L. R. 814, 96 A. L. R. 1353, 33 A. L. R. 1397,

Ann. Cas. 1913E 339, 9 Ann. Cas. 1005, 15 Ann. Cas. 470, 120 Am. St. Rep. 885.

PRESUMPTION OF CONSTITUTIONALITY

" * * * There is a strong presumption that a legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience, and that its discriminations are based upon adequate grounds," (11 Amer. Jurisprudence 794, "Constitutional Law", Sec. 131).

" * * * To doubt the constitutionality of a law is to resolve every or all doubt in favor of its validity * * * ". (Above authority pp. 780 & 781).

"* * * It is only where its invalidity is made to appear clearly, plainly, palpably, and by irretrenchable evidence, where the case is so clear as to be free from doubt, or the act is manifestly in contravention of the constitution, and where all in all invalidity is disclosed in such a manner as to leave no reasonable doubt, that the courts will declare it unconstitutional." (Above authority pp. 786-788).

The above rules apply to city ordinances. (Same authority p. 798).

"Mere unreasonableness does not necessarily render a statute unconstitutional. This rule does not mean that constitutional guarantees can be violated by unreasonableness.

Thus the court may inquire whether an act of Congress is arbitrary or capricious, that is whether it has reasonable relation to a legitimate end. If, however, there is room for fair debate as to whether a municipal ordinance is arbitrary or unreasonable, the court will not substitute its own judgment for that of the legislative body charged with the primary duty and responsibility of determining the question." (Above authority pp. 802 - 808).

"* * * All questions of policy are for the determination of the legislature, not for the courts." (Above authority, p. 815)

The above principles are supported by many decisions of this court as well as by many decisions of state courts. They are especially applicable to the case here at bar, because the question was peculiarly one for the local legislative body to determine; whether conditions on the city streets were such that mothers and fathers should permit their young children to sell or distribute magazines, periodicals or other literature thereon, and whether the health of the community will be better preserved by giving the children periods of rest and recreation, while not in attendance at school, and whether children will grow up into better manhood and womanhood, and be better citizens and more capable to cope with the difficulties of life by having their childhood blessed by some of the more cheerful and happy things of life which come from association with other child-

ren in the playing of games, and obtaining of recreation in the fresh air.

It is possible that a loving mother may be so fanatical or so enthusiastic along certain lines or so ignorant concerning the importance of recreation and play for children as to urge or require them to perform tasks which constitute an unfair hardship and burden and injure them for life. As between the legislative power of the State and the authority of the mother or father, or both combined, over young children, the State has the first and paramount right to provide for bringing up children in a way that will be most likely to produce healthy, strong citizens who have a cooperative spirit and who are fairly tolerant of the opinions and beliefs of others.

The thought that a mother has done her duty and is to be commended when she has trained her children (as Mrs. McSparran claims to have done) in the "nurture and admonition of the Lord" so that they will prefer to stand for long periods of time on a street holding up a magazine for sale or distribution in place of engaging in recreation and sports with other children, and that her children while so standing on the street and holding up these magazines are worshipping Jehovah, is a misconceived thought, born of ignorance and fanaticism,—a misdirected service in the interest of a great publishing house.

As between the state and cities, to which the state has

given proper legislative power, and the mothers or fathers of children, the state or city has undoubted paramount control. Otherwise the state would be unable to prevent fanatical mothers and fathers from murdering their children in supposed worship of their God or Great Spirit.

The United States did not commit suicide when the 14th Amendment was adopted. The people of the Oregon Territory, by adopting constitutional provisions for the four freedoms (press, speech, religion and worship), did not nullify the provisions which vest in the legislative assembly power to legislate upon all matters concerning the welfare of the people within the state and did not nullify the powers given to the courts to administer justice. All of the constitutional powers must be considered and construed together. The result is that the legislative branch of the government may pass laws restricting and limiting many things which would otherwise be regarded as natural or inherent rights. Thus legislation is valid which prohibits polygamy (*Reynolds v. United States,* 98 U.S. 145, 161, et seq., 25 L. ed. 244, 248; *Morman Church v. United States,* 136 U.S. 1, 34 L. ed. 481); which requires children to be vaccinated (*Jacobson v. Massachusetts,* 197 U.S. 11, 49 L. ed. 643; *State v. Martin,* 134 Ark. 420, 204 S.W. 622), which requires children who are sick to be properly treated notwithstanding a religious belief to the effect that treatment should not be applied (*People v. Pierson,* 176 N.Y. 201, 68 N.E. 243, 63

L.R.A. 187); which requires children to attend school; which requires that their teeth be properly cared for; which requires that they be taken away from parents who neglect them, etc.

Based upon the principle that each state is *parens patriae* of the children within its borders, the various states have enacted juvenile regulation for the more efficient control and supervision of children. In 31 Am. Jur. 787 "Juvenile Courts and Offenders", sec. 6, we read:

> "Such statutes have also been held not to be unconstitutional * * * *as unlawfully interfering with the relation of parent and child.* In many cases the courts have proceeded upon the theory that legislation respecting the commitment, care and custody of the inmates of reformal institutions for children is an exercise of the inherent power of the state as *parens patriae,* to interfere on behalf of infants, even between them and their parents, when the morals, safety, or interests of such children require it."

From the above it will be seen that the power of the state (and in this instance the City of Portland as a state agency) to enact and enforce legislation relative to the welfare of children notwithstanding the fact that some mothers may be very much opposed to the enforcement of the law, is not dependent alone upon an exercise of the police power but may be referred to the right of *parens patriae,* as explained by the supreme court of Oregon in the Shorey case, supra.

CASES CITED BY PETITIONER AND SOME OTHERS

No review need be here made of the cases cited in behalf of the petitioner. None of them is in conflict with the constitutional principles above stated. In fact they are all in support of the above principles. The case of *Pierce v. Society of Sisters,* 268 U.S. 510, 69 L. ed. 1070 is perhaps the strongest of the cases cited. The case involved a statute which made it unlawful to send children between 8 and 16 years of age to any school except a public school unless a permit for private education be obtained. Two school corporations (one being the Society of Sisters, and the other Hill Military Academy) filed suit to have the act declared unconstitutional, alleging that the complainants had large investments in school plants for children where educational work had been conducted for many years; that the primary departments were associated with other educational work so that the entire investment would be lost if the statute be held valid and thus the complainants would suffer irreparable injury; that their educational work was not inherently harmful but was useful and meritorious, and conducted along the same lines as the public schools in the state covering the same subjects and in compliance with the requirements of the state board of education, etc. The case came before the court on the sufficiency of the complaint, and it was held sufficient. The court, however, thus recognized the police power (p. 534 of 268 U.S.):

"No question is raised concerning the power of the

state reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; *to require that all children of proper age attend some school, that teachers shall be of good, moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.*"

In the case of *Meyers v. Nebraska,* 262 U.S. 300, 67 L. ed. 1042, the complainant had been convicted of teaching the subject of reading in the German language to a child 10 years of age who had not passed the eighth grade, thus violating a certain statute. The court found and held that the statute was arbitrary "and without reasonable relation to any end within the competency of the state."

We have no criticism to make against this case, or, in fact, any of the other cases cited in support of the petitioner. We wish, however, to briefly comment upon the New Hampshire cases,—which seem to be especially relied upon by her, (In Re Rowland Lefebvre, et al, 20 Atl. (2d) 185, and *State v. Richardson,* 27 Atl. (2d) 94).

The former of these cases (like the Gobitis case, 310 U.S. 585, 84 L. ed. 1375) concerned the validity of a school regulation which required a flag saluting exercise as a part of the school work. The Lefebvre children were expelled from school because of the refusal of their parents to allow them to join in this exercise. The children were subsequently

brought before the juvenile department of the municipal court of Nashua on a charge of being delinquent children *because they were not attending school.* The supreme court of New Hampshire held that the definition of delinquent children in the juvenile law was not sufficient to authorize the municipal court to uphold the charge. Notwithstanding the fact that the case was thus disposed of, the Court commented at some length about "freedom of religious concepts" and "civil liberties", all of which we think was *orbiter dicta* and we do not think the court would have thus commented if the court had been familiar with the activities of Jehovah's Witnesses and with the doctrines advanced in their magazines and books, especially the books entitled: "Religion", "Enemies", "Government" and "Children".

The other New Hampshire case involved a statute quite similar to the ordinance here involved. The defendant was charged with violating it by employing a boy under 10 years of age and permitting him to sell magazines on the streets. It provided that "whoever *employs* any child, and whoever permits or suffers any child *under his control* as parent, guardian or otherwise, to be employed or to work in violation of the foregoing provisions shall be guilty of a criminal offense." The court found from the evidence that the defendant (a leader of the group of Jehovah's Witnesses of which the boy and his mother were members) was not a parent, guardian or otherwise in control of the boy and did

not employ the boy, who like the McSparran children, went of his own accord with his mother to join in selling or distributing the magazines. Thus the law was not violated by the defendant and the Supreme Court so held. Here again the Court made comments along the line of those made in the Lefebvre case, all of which, as we think are *obiter dicta.*

A New Hampshire case more in point on the subject of the police power is *Cox v. State of New Hampshire* 91 New Hamp. 137, 16 A (2d) 508,—same case in this Court 312, U.S. 569, 85 L. Ed. 1049, 61 S. Ct. 762, 133, A.L.R. 1396, where several of Jehovah's Witnesses were found guilty of violating a statute which prohibited parades in a street without obtaining a license. Both the Supreme Court of New Hampshire and this Court held the statute valid. This Court said (p. 574 of 312 U.S.):

> "Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses. The authority of a municipality to impose regulations in order to assure the safety and convenience of the public in the use of public highways has never been regarded as inconsistent with civil liberties, but rather as one of the means of safeguarding the good order upon which they ultimately depend."

The report of this case shows that the witnesses were at the time of the parade carrying signs reading, "Religion is

a snare and a racket". See also cases in Annotations beginning at page 1404 of 133 A.L.R., and *People v. Burman,* 154 Mich. 150, 25 L. R. A. N. S. 251 and Annotations on pages 251-254.

In this connection we may mention a late case in the Superior Court of the State of Washington for Thurston County by *Lettie E. Stone v. Mack Stone,* No. 19826, a divorce proceeding, where the court awarded the defendant a divorce and the custody of the children, saying:

> "In awarding the custody of the children to the defendant, the Court does not mean to imply that the plaintiff is not a fit and proper person, morally, to have their custody, but she is a member of a fanatical organization with teachings entirely inimical to the rearing of children as American citizens. In fact the zealots of the cause insisted upon demonstrating, in court, *that they would not salute the American flag and that they did not believe in voting and it is apparent that any child raised in this atmosphere, could not become a loyal American.*"

Opinion dated May 20, 1942, by Judge D. F. Wright.

Other recent cases are: *Hamilton v. University of California,* 219 Cal. 663, 28 Pac. (2d) 355, 293 U.S. 245, 79 L. Ed. 343, where a statute was upheld which required students at the State University to take military training; and *Jones v. Opelika,* 316 U.S. 584, 86 L. Ed. 1691, where several city ordinances were upheld which made it unlawful

to sell magazines etc. on the streets without a license. These ordinances were attacked by some of Jehovah's Witnesses.

Other laws and ordinances recently brought under attack by Jehovah's Witnesses may be seen in *Hilley v. Spivey, Sheriff*, 162 S.W. (2d) 426; *Largent v. Reeves, City Marshal*, 162 S.W. (2d) 419, and *Killam v. City of Floresville*, 162 S.W. (2d) 429, all of which came before this Court on application for a writ of certiorari, but the writ was denied (see cases numbered 348, 349 and 350 in 87 L. ed. Adv. Opinions, p. 47).

In view of the comments made by the court in the New Hampshire cases and some of the references in other courts to Jehovah's Witnesses as following their *religious* belief and worship in the matter of selling or distributing these magazines on the streets and going from house to house to distribute or sell books and other literature put out by the Watch Tower Bible and Tract Society, Inc., a publishing house at 117 Adams St., Brooklyn, New York, we will here show the real character of this organization.

The genesis, organization and some activities of Jehovah's Witnesses (formerly designated Russellites from its founder, C. T. "Pastor" Russell, who began his activities in Pennsylvania about 1874) are given in Saturday Evening Post, September 14th, 1940, pages 18 and following. See also Encyclopedia of Religion and Ethics, vol XI, p. 286b, the magazines Consolation and Watch Tower introduced in

evidence in this case as Exhibits 1 and 2, Exhibit 3 shown on pp. 91 and 92 of the transcript, the testimony of Mrs. McSparran and of Norman Larson on pp. 17 - 42. From this it appears that the activities of Mrs. McSparran and other so-called Jehovah's Witnesses are controlled by the Watch Tower Bible and Tract Society, Inc., which issues a certificate (Ex. 3,—Tr. p. 91) referred to as an ordination "to preach the Gospel of God's Kingdom under Christ Jesus and is therefore one of Jehovah's Witnesses * * * sent forth by this society, which is created and organized and chartered by law to preach the Gospel of God's Kingdom, and that Jehovah's Witnesses are commanded to obey God by preaching the Gospel * * * and *that Jehovah's Witnesses are compelled to obey God rather than men* * * *. That in obedience to God's commands Jehovah's Witnesses preach the Gospel and worship Almighty God by calling on the people at their homes and exhibiting to them the message of said Gospel in printed form, such as the Bible, books, booklets and magazines, and thus afford the people the opportunity of learning of God's gracious provision for them." The document is issued over the facsimile signature of J. F. Rutherford, president.

The book called "Religion" is advertised on the back of the certificate (Tr. p. 92).

We think the court may take judicial notice of the general doctrine advanced through this book and other books writ-

ten by J. F. Rutherford, published by the Watch Tower Bible and Tract Society, Inc., and widely circulated by the activities of the Witnesses (31 C.J.S. 510 - 513, 516 - 519; 20 Am. Jur. 48 - 52). Mrs. McSparran testified that her occupation was an ordained minister to preach the Gospel of God's Kingdom (Tr. p. 17). Exhibit 3 and the magazines show that this occupation is selling or distributing on the streets and going about from house to house offering the books and other literature and playing phonograph records which give information concerning "God's Kingdom".

The magazines and books (see "Religion", "Government" and "Enemies", all by J. F. Rutherford) show that this Kingdom is different than the spiritual Kingdom contemplated usually by Christians. It is THE THEOCRASY which is said to have begun in 1914 and is very soon to be completed by the battle of Armagedon when our government and all other governments on earth will be overthrown.

These magazines and books show further that Jehovah's Witnesses must be loyal to THE THEOCRASY rather than to any other government, and for this reason and because there is a commandment in the Old Testament not to bow down to or worship any graven image, etc., the Witnesses must not salute the American flag or any other flag, vote at election or otherwise participate in governmental activities, but must devote their entire energy to the sale or distribution of literature which teaches that all religions and

governments are instrumentalities of Satan, the Wicked Serpent, etc. (see "Enemies" by J. F. Rutherford, first printing 1,000,000 copies, copyrighted 1937, pp. 67, 69, 71, 100, 101, 130 and 139, especially p. 100 concerning religion, pp. 327 and 335 concerning government and p. 73 concerning the mission of Witnesses; also "Religion" by J. F. Rutherford, 1,000,000-edition, copyrighted 1940, pp. 23, 44, 47, 60, 67, 72, 77, 79, 81, 89, 94, 96, 104, 107, 110, 121, 122 and 173, and "Government" by J. F. Rutherford, 2,457,500-edition, copyrighted 1928, pp. 34, 41, 270, 272, 274, 276, 279, 281, 308, 329 and 330). All of the books and magazines are printed by Watch Tower Bible and Tract Society, Inc.

Page 173 of "Religion" shows that this printing house had put out and the Witnesses had distributed 309,000,000 books and booklets in more than seventy different languages at the end of 1939.

The fact that the Jehovah's Witnesses organization is not a religious organization and should not be counted as such is shown by page 5 of the petition herein where it is said that the Watch Tower strictly adheres to the Bible, "being strictly free and separate from all religion * * *." It may be observed, however, from a reading of the Watch Tower and Consolation and checking the Bible references that in many instances the conclusions announced are dogmatic rather than warranted by any fair interpretation of the Bible text, and that those who believe in the doctrines of this

organization have the utmost scorn and intolerance toward all religions and religious teachers and preachers and but little less scorn for governments, government officials and men engaged in commerce designated as commercialists. It is little wonder that the playing of their records upon the streets and front porches of houses provoke wrath and sometimes breaches of peace.

ANSWERING SOME OF PETITIONER'S POINTS RE POLICE POWER

On page 5 of the petition and supporting brief it is said that the Watch Tower and Consolation magazines "are not subversive, nor do they advocate the use of force by other persons or anyone to overthrow the government." There may be a difference of opinion concerning the meaning of "subversive" in the matter of overthrowing the government, but we respectfully maintain that it is subversive for anyone to distribute on the streets or elsewhere magazines or other literature which advocates the doctrine that this government and all other governments are wicked instrumentalities of Satan and that all government officials are under the control of commercialists who act purely for selfish ends; that all religions are also instrumentalities of Satan and working hand in hand with the commercialists, the politicians and government officials for the purpose of oppressing the

people, and that all Christians are wicked and condemned to eternal death unless they embrace the doctrine of Jehovah's Witnesses, and that those who truly follow the doctrine of Jehovah's Witnesses cannot salute the country's flag or vote at any election or exercise any of the political duties of good citizens or take any part in defending the country against other countries which wage war upon it, and that they must violate the laws of the land whenever these laws come in conflict with what they conceive to be the law of God. We further maintain that the theory advanced that this government is about to be overthrown by *The Theocrasy* through the will and power of God without any human instrumentality is a time serving story which may be quickly converted into force, if numbers seem sufficient, as was the case at Jericho when besieged by the hosts of Joshua (Joshua 6:20 & 21).

On page 11 it is said that this case is "for the purpose of protecting the most sacred of all human rights from encroachment by misapplied laws." There is no contention on the part of the respondent in this case that a mother may not care for and instruct her children in the ways of right living but when a mother undertakes to follow "instructions", whether direct from Jehovah to her or through the medium of the Watch Tower Bible and Tract Society, Inc., which violate state or city laws for the public health, safety and welfare, and especially for the welfare of children, such

mother, as we maintain, is acting under misapprehension as to the laws of God, as well as violating the laws of man—at any rate, the present law of the land must control until *The Theocrasy* takes over, lest there be anarchy.

On page 13 it is said that the undisputed evidence shows that the petitioner did not profit from the activity of her children. This may be true in so far as money goes, but it is not true in so far as her well-being (according to her professed belief) is concerned, for it will be seen from the evidence in this case, the magazines, and the books above mentioned, that the petitioner, by distributing the magazines and having her children with her, is doing what she thinks is necessary in order to win life everlasting upon this earth and have a part in directing the affairs of *The Theocracy,*—a government which is supposed to correct all the ills of this and other governments, harness the power of the ocean waves, convert this power into labor-saving machinery for use throughout the earth, build a wonderful boulevard from the Pacific to the Atlantic oceans with many beautiful stopping places long its course, etc., etc.,—a real panacea.

On page 14 it is said that it is "the duty and privilege of parents and children to practice what they preach by consistently acting as Jehovah's witnesses before men." This may be accepted as true, except in cases where the man interpreted laws of God conflict with the laws of the land, in which case it is the duty of the mother to instruct the

children to follow the laws of the land rather than to follow what she or the Watch Tower Bible and Tract Society, Inc., or some of its officers may have relayed to her as the laws of God.

On page 15 it is said that there is no contention that "petitioner neglects her duty in bringing up the children." In this she is in error, for we maintain that it is a neglect of duty on her part to teach and bring up her children to violate a law or city ordinance like the one here under consideration.

On the same page it is said that there is "no evidence that there was a sale or that the children were offering or exposing for sale periodicals or magazines." She overlooks the fact that these magazines were held up by the children with the apparent purpose of attracting passers-by and that the children displayed canvas bags on which was written: "Watch Tower and Consolation, 5 cents a copy" (Tr. p. 21, and see p. 5 of petitioner's petition and brief). Moreover, the lower court found that the children were offering the magazines for sale and this finding, as we understand the law, is controlling in this phase of the case.

The theory that the children were giving away the magazines and receiving in return contributions of five cents each is an apparent subterfuge.

On page 16 it is said that the "petitioner's activity is

charitable and non-profit." We assume that there is no money profit to her but we do not make the same assumption with respect to the Watch Tower Bible and Tract Society, Inc. or its officers. She, however, has been induced to believe that she will obtain a greater profit than money by selling or distributing the magazines and thus gaining an everlasting life of joy.

In the case of *Cantwell v. Connecticut,* 310 U.S. 291, 84 L. Ed. 1213, 60 S. Ct. 900, 128 A.L.R. 1352 clearly illustrates the distinction between the rights protected by the 14th Amendment and the police power with respect to the activities of Jehovah's Witnesses. On the fifth count this court concluded from the evidence that the witnesses were not guilty of inciting to riot because they desisted playing the records as soon as they discovered that annoyance was caused. The court did not declare this statute unconstitutional.

CONCLUSION

From the authorities and facts above submitted it must be concluded as we submit (1) and (2) that this petition, if applying to the Supreme Court of Oregon, is not applicable, inasmuch as the Supreme Court of Oregon passed on no federal question, and, if the petition be deemed as applicable to the Circuit Court, it comes too late and there-

fore fails to afford jurisdiction to this Court; (3) that the record fails to show that a federal question such as that now asserted was definitely submitted to the Circuit Court and passed upon by the Court, and thus the record is insufficient to give this Court jurisdiction; and (4) that the question here submitted (if the Court may be regarded as having jurisdiction to consider it) is not a novel question, or one of importance such as to call for a review by this Court, but presents a question which is very definitely settled by the well established principles (a) that as to minors the state is *parens patriae,* and (b) that the police power fully warrants legislation for the protection of children like the ordinance here considered. The writ should, therefore, be disallowed.

Respectfully submitted,

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